

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARIA HINOJOS

Claimant

VS.

CARGILL MEAT SOLUTIONS CORPORATION

Self-Insured Respondent

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Docket No. 1,031,245

ORDER

Claimant appealed the January 11, 2007, Order Denying Compensation that was entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

Claimant alleges that she injured her back working for respondent due to a series of mini-traumas. In the January 11, 2007, Order Denying Compensation, the Judge denied claimant's request for workers compensation benefits "for lack of proper notice."

Claimant contends Judge Fuller erred. Claimant argues she gave respondent notice of her back injury on February 12, 2006, which was the last day she worked for respondent, and again on February 16, 2006. Accordingly, claimant requests the Board to reverse the January 11, 2007, Order.

Conversely, respondent argues the Order should be affirmed. Respondent contends claimant did not advise that her back symptoms were from her work activities but, instead, she represented that her symptoms were from a personal condition. Moreover, respondent argues claimant testified she did not learn her back problem was related to her work activities until she saw Dr. Abay in May 2006. In any event, respondent argues claimant failed to provide notice as required by K.S.A. 44-520.

The only issue on this appeal is whether claimant provided respondent with timely notice of her alleged accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant alleges she injured her back in a series of repetitive mini-traumas. The last day claimant worked for respondent was on or about February 12, 2006. It is undisputed claimant had advised respondent she was experiencing symptoms she described as being around her waist. But claimant did not advise respondent she had sustained a work-related injury. Indeed, on or about February 13, 2006, claimant was advised by the doctor's office where she had sought treatment that her problem was related to her kidneys. According to claimant, she did not learn the nature of her problem until May 2006, when she consulted with Dr. Abay.

In July 2006, claimant gave respondent written claim for workers compensation benefits.¹ And in August 2006, Dr. Abay performed back surgery.

As indicated above, the Judge determined claimant failed to provide timely notice of her accident. Notice is governed by K.S.A. 44-520, which requires workers to notify their employer within 10 days of an accident. But that 10-day period is extended to 75 days when there is "just cause."

The parties did not stipulate to the date of accident. And the Judge did not make any specific finding regarding that date. Consequently, the Board must first find the date of accident before it can determine whether claimant provided timely notice. And that presents a problem due to recent amendments in the Workers Compensation Act.

The Workers Compensation Act now provides what the date of accident will be for repetitive trauma injuries that may occur over a considerable period of time. In short, K.S.A. 2005 Supp. 44-508(d) provides that the accident date for a repetitive trauma injury is the date an *authorized* physician either prohibits a worker from working or the date the physician restricts the worker from performing the work that caused the repetitive trauma injury. If the worker is not taken off work or restricted, then the date is the earlier of when the worker gives written notice to the employer or the date the worker's condition is diagnosed as being work-related, if that is communicated in writing. And if none of those situations apply, then the date of accident is the date determined by the administrative law judge based upon the evidence. K.S.A. 2005 Supp. 44-508(d) provides:

"Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events,

¹ P.H. Trans. at 11, 12.

repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

It does not appear the parties addressed the notice issue in the context of the recently enacted date of accident statute. And this Board Member is reluctant to determine the date of accident under the methodology now set forth in K.S.A. 2005 Supp. 44-508(d) without the parties having an opportunity to present any pertinent evidence and argument. Without allowing the parties an opportunity to present their evidence would place the Board in the position of attempting to decide an issue based upon an incomplete record.² Consequently, this claim should be remanded to the Judge for further proceedings to determine the date of accident under K.S.A. 2005 Supp. 44-508(d) and to consider the notice issue in light of that finding.

WHEREFORE, the Board remands this claim to Judge Fuller to determine the date of accident under K.S.A. 2005 Supp. 44-508(d) and to consider the notice issue in light of that finding.

IT IS SO ORDERED.

Dated this ____ day of March, 2007.

BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge

² See *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 416 P.2d 771 (1966).